UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X
DANIEL McGUIRE,

08 Civ. 2049 (SCR)

Plaintiff,

-against-

VILLAGE OF TARRYTOWN, et al.,

Defendants.
---X

MEMORANDUM OF LAW

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Our File No.: 08-125

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PRELIMINARY STATEMENT

Plaintiff brings the instant lawsuit against the Village of Tarrytown, Drew Fixell, Steve McCabe, Scott Brown, Sergeant Frank J. Giampiccolo, Sergeant John C. Gardner, Sergeant John Barbelet, Sergeant Kevin Barbelet, Police Officer Christopher Cole, Police Officer Gregory M. Budnar, Police Officer Dennis C. Smith, Police Officer Brian F. Macom, Barry Warhit, Shameka Taylor, County of Westchester, District Attorney's Office, County of Westchester. The complaint alleges false arrest/selective enforcement, malicious prosecution/abuse of process, and violations of 42 U.S.C. §§ 1983, 1985(2) clause 2, 1986, and 1988(b).

Plaintiff alleges that, after he and his neighbor had a dispute, he called the police, and that the police officers who responded would not take his complaint. After a second dispute with the same neighbors, the neighbors called police and informed them that plaintiff threatened them with a gun. Plaintiff was arrested on June 9, 2007.

According to the complaint, after his arraignment, plaintiff contacted the Westchester County District Attorneys Office and Mayor Drew Fixell to file a complaint against the complaining neighbors and the police for filing false arrest documents and was informed that it was Village policy that, "Village policy (common policy in police departments in this area) not to file cross-complaints but rather to refer the complainant to the District Attorney's office.". In September 2007, plaintiff was tried and acquitted of all charges during a jury trial before Tarrytown Village Justice Barry Warhit.

As a matter of law, plaintiff did not plead that he was a member of a protected class as required under 42 U.S.C. § 1985 and also that plaintiff's §1986 claim should also be dismissed because plaintiff does not have a viable § 1985 claim. In addition, This Court should grant Justice Barry Warhit judicial immunity from this suit because he acted within the scope of his judicial duties. Finally, plaintiff has failed to plead facts or law that evinces a cause of action against Defendant Kevin Barbelet.

ARGUMENT

POINT I

PLAINTIFF'S §§ 1985(2) AND 1986 CLAIMS MUST BE DISMISSED.

It is well settled that a plaintiff attempting to establish a claim under 42 U.S.C. § 1985(2),[1] clause 2 must demonstrate that the defendants herein acted with class-based invidiously discriminatory animus. Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 266-68, 113 S.Ct. 753, 758 (1993) (quoting Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798 (1971)). See also Herrmann v. Moore, 576 F.2d 453, 456-58 (2d Cir.1978) (dismissing claims under both 42 U.S.C. § 1985(2) and § 1985(3)). Plaintiff's complaint fails to provide any factual basis for membership in a protected class.

In addition, "Complaints containing only conclusory, vague, or general allegations that the defendants have engaged in a conspiracy to deprive the plaintiff of his constitutional rights are properly dismissed; diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct." Ciambriello v. County of Nassau, 292 F.3d 307 (2nd Cir. 2002). Plaintiff must plead conspiracy with specificity and not just couch the complaint in constitutional language and conclusory allegations. Laverpool v. New York City Transit Authority, 760 F.Supp. 1046 (E.D.N.Y. 1991).

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[1] 42 U.S.C. § 1985(2) provides: "If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws."

While plaintiff quotes the second clause of § 1985(2) in his complaint, that is not enough to survive dismissal. Laverpool, 760 F.Supp. 1046. Plaintiff failed to specify the protected class that he belonged to and the invidiously discriminatory animus he suffered. Therefore, plaintiff's §1985(2) claim should be dismissed as a matter of law.

A successful 42 U.S.C. § 1986 claim must be predicated upon a valid § 1985 claim. Mian v. Donaldson, Lufkin & Jenrette Securities Corp., 7 F.3d 1085 (2nd Cir. 1993). The Second Circuit emphasized that an essential element to each § 1985 cause of action is a requirement that the alleged discrimination took place because of the individual's race. Mian, 7 F.3d 1085.

Because plaintiff's § 1985 claim fails and there are no allegations pertaining to plaintiff's race, plaintiff's § 1986 claim must be dismissed as a matter of law.

POINT II

JUSTICE BARRY WARHIT IS ENTITLED TO JUDICIAL IMMUNITY.

Judicial immunity has been created both by statute and by judicial decision "for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." Pierson v. Ray, 386 U.S. 547, 554, 87 S.Ct. 1213 (1967). "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099 (1978). "The factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity." Stump, 435 U.S. at 362, 98 S.Ct. 1099.

Plaintiff's allegation here is that Justice Warhit did not disclose that he had represented brothers of a witness against plaintiff. Plaintiff's Complaint ¶ 25. Plaintiff admits that Justice Warhit's former client is not a witness in this case. Plaintiff's Complaint ¶ 25. Plaintiff claimed that his attorney was denied an opportunity to make a recusal motion. Plaintiff's Complaint ¶ 25.

A judicial decision on whether to identify a tenuous connection to a witness and whether recusal is proper is clearly within the scope of a judicial act. Manhattan King David Restaurant, Inc. v. Blackshear, 101 F.3d 685 (2nd Cir. 996); Pikulin v. Gonzales, 2007 WL 1063353 (E.D.N.Y. Apr 05, 2007).

Moreover, in In re Douglas, 995 F.2d 231 (9^{th} Cir. 1993), the Ninth Circuit, albeit in a case dealing with prosecutorial immunity said, "A prosecuting attorney who initiates and prosecutes a criminal action is immune from a civil suit for money damages under 42 U.S.C. § 1983. Absolute immunity applies only when the challenged activity is "intimately associated with the judicial phase of the criminal process." "[P]rosecutors are absolutely immune for quasi-judicial activities taken within the scope of their authority." Neither a conspiracy nor a personal interest will pierce a prosecutor's absolute immunity. (Citations omitted)

Because Justice Warhit was acting within the scope of a judicial act, he must be granted judicial immunity from this action.

POINT III

PLAINTIFF FAILS TO STATE A CAUSE OF ACTION AGAINST KEVIN BARBELET.

Plaintiff fails to identify any action taken by defendant Kevin Barbelet. Even under modern notice pleading, a plaintiff must do more than throw a name in a caption to survive a motion to dismiss.

In order to make out a New York common law or 42 U.S.C. § 1983 claim for false arrest or imprisonment, plaintiff must demonstrate that defendant intended to confine him, he was conscious of the confinement, he did not consent to the confinement, and the confinement was not otherwise privileged. See Singer v. Fulton County Sheriff, 63 F.3d 110, 118 (2nd Cir. 1995).

To state a 42 U.S.C. § 1983 claim of malicious prosecution, plaintiff must plead conduct by Kevin Barbelet that is tortious under state law and that results in a constitutionally cognizable deprivation of liberty. See Singer, 63 F.3d 110, 116-17.

To state a claim under New York law for the tort of malicious prosecution, a plaintiff must show: (1) that the defendant commenced or continued a criminal proceeding against him; (2) that the proceeding was terminated in the plaintiff's favor; (3) that there was no probable cause for the proceeding; and (4) that the proceeding was instituted with malice. See Lowth v. Town of Cheektowaga, 82 F.3d 563, 571 (2nd Cir. 1996).

The only connection to plaintiff's arrest, according to the complaint, is that Kevin Barbelet is accused of is employing a complaining witness. See Complaint, ¶ 4. Plaintiff does not allege that Kevin Barbelet took part in his arrest or played any role at all in his prosecution.

A crafty plaintiff's lawyer may think that giving more defendants sleepless nights by adding them as defendants in federal lawsuits is the way to win bigger settlements. The law, unfortunately, does not permit such tactics. Fed. R. Civ. Pro. 12(c) stands in the way.

CONCLUSION

For the reasons set forth herein, defendants respectfully request that the Court dismiss grant the instant motion, with costs, disbursements, and such other and further relief as to this Court is just, proper, and equitable.

Dated: Mineola, New York
April 30, 2008

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